Supreme Court, U.S.
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No. 95-1483

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTURO YANEZ-PENALOZA

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an individual who has been found deportable by a final order of the Board of Immigration Appeals remains eligible to file a motion to reopen deportation proceedings to seek relief from deportation under 8 U.S.C. 1182(c), even though that relief is available only to permanent resident aliens and an individual found deportable by the Board no longer has the status of a permanent resident alien.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-11) is unpublished, but the decision is noted at 77 F.3d 473 (Table). The orders of the Board of Immigration Appeals (Pet. App. 12-16, 17-24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1995. The petition for a writ of certiorari was filed on March 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico whose status was adjusted to that of a lawful per-

manent resident alien on August 10, 1978. Pet. App. 18. On July 30, 1992, petitioner was arrested after entering the United States without inspection in the company of two undocumented aliens. *Ibid.* Petitioner pleaded guilty in the United States District Court for the Western District of Texas to illegal entry in violation of 8 U.S.C. 1325. Pet. 2. The Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner in July 1992, contending that his conduct rendered him deportable under 8 U.S.C. 1251(a)(1)(B). The immigration judge found petitioner deportable. Pet. App. 18.

Petitioner also applied for suspension of deportation under 8 U.S.C. 1254(a)(1) but was found statutorily ineligible for that relief. Pet. App. 18. In a decision rendered on October 4, 1994, the Board of Immigration Appeals affirmed the immigration judge's finding of deportability and the denial of suspension of deportation. *Id.* at 17-24. Petitioner did not seek review of the deportation order in the court of appeals within 90 days, as required by 8 U.S.C. 1105a(a)(1). Pet. App. 11; see *Stone* v. *INS*, 115 S. Ct. 1537, 1542 (1995).

2. On November 1, 1994, petitioner filed a motion with the Board asking it to reconsider its deportability determination and to reopen his deportation proceedings to permit him to seek relief from deportation under 8 U.S.C. 1182(c). Pet. App. 15. The Board denied that motion on March 3, 1995. *Id.* at 12-16. The Board declined to reconsider its decision, because it determined that it had considered all the material facts and properly applied the law. *Id.* at 13-14. It also refused to reopen, explaining that an alien seeking reopening must show his prima facie elig-

ibility for the relief sought, and that relief under 8 U.S.C. 1182(c) is limited to lawful permanent residents. Pet. App. 15. Relying on its decision in *In re Cerna*, 20 I. & N. Dec. 399 (BIA 1991), aff'd, 979 F.2d 212, 213 (11th Cir. 1992) (Table), the Board reasoned that petitioner was not a permanent resident at the time he filed the motion to reopen because the Board's earlier decision had resulted in an administratively final order of deportation that deprived him of permanent resident status. Pet. App. 15. The Board also relied on Fifth Circuit precedent adopting *Cerna*'s reasoning. *Ibid.* (citing *Prichard-Ciriza* v. *INS*, 978 F.2d 219, 223 (5th Cir. 1992); *Ghassan* v. *INS*, 972 F.2d 631, 637-638 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993); *Garcia-Hernandez* v. *INS*, 821 F.2d 222, 224 (5th Cir. 1987)).

3. The court of appeals dismissed petitioner's petition for review of the Board's denial of his motion to reopen. Pet. App. 10-11.

ARGUMENT

1. Petitioner argues (Pet. 3-8) that the Board erred in denying his motion to reopen the deportation proceedings or to reconsider its deportability determination.[1] As this Court has explained, an alien

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[1] While petitioner now emphasizes that he requested *reconsideration* from the Board (Pet. 5), he raises no issue of law concerning motions for reconsideration on which the courts of appeals are divided. Unlike a motion to *reopen*, which seeks to bring new factual developments before the tribunal, a motion to *reconsider* is directed at convincing the tribunal that it erred in resolving the matters placed before it when it originally ruled. See *Cerna*, 20 I & N. Dec. at 402. To the extent that petitioner's November 1, 1994 motion sought reconsideration, as distinct from reopening, the motion was based on petitioner's claim that the Board improperly relied on certain documentary

seeking to reopen deportation proceedings must make a prima facie showing that he is eligible for the relief he seeks. *INS* v. *Abudu*, 485 U.S. 94, 104 (1988); see also *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). To be eligible for relief under 8 U.S.C. 1182(c), an alien must, among other things, be a lawful permanent resident alien. Under 8 U.S.C. 1101(a)(20), an alien is "lawfully admitted for permanent residence" if he has "the status of having been lawfully accorded the privilege of residing permanently in the United States * * *, such status not having changed." Hence, the principal question in this case is whether petitioner's status as a lawful permanent resident alien "changed," for purposes of 8 U.S.C. 1101(a)(20), at the time the Board issued a final order of deportation.

The Immigration and Nationality Act mandates that deportation decisions "shall be final" upon completion of administrative proceedings. 8 U.S.C. 1252(b) (Supp. IV 1992); 8 C.F.R. 243.1 ("an order of deportation * * * shall become final upon dismissal of an appeal by the Board"). Because the Board's finding of deportability is the final administrative act in the alien's deportation proceeding, the Board consistently has held that a lawful permanent resident alien loses his lawful permanent resident status when the Board issues its final order. *In re Lok*, 18 I. & N. Dec. 101, 106 (BIA 1981), aff'd on other

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evidence in finding him deportable. See Pet. App. 13-14. Petitioner does not suggest that the Board committed any error in rejecting that fact-bound claim. In any event, the Board's denial of petitioner's motion (insofar as it sought reconsideration) would not appear to be subject to judicial review. See *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280-284 (1987).

grounds, 681 F.2d 107 (2d Cir. 1982). An alien is not thereafter eligible to seek relief, such as relief from deportation under 8 U.S.C. 1182(c), that is dependent on permanent resident status.[2]

2. Petitioner correctly notes (Pet. 4) that the courts of appeals have reached conflicting results on the question of the eligibility of an alien to seek reopening for purposes of seeking relief under Section 1182(c) once the Board has found him deportable. Compare *Nwolise* v. *INS*, 4 F.3d 306, 310-312 (4th Cir. 1993) (accepting Board's analysis), cert. denied, 114 S. Ct. 888 (1994); *Katsis* v. *INS*, 997 F.2d 1067, 1072-1075 (3d Cir. 1993), cert. denied, 114 S. Ct. 902 (1994) (same); *Ghassan*, 972 F.2d at 637-638 (same), with *Acosta-Montero* v. *INS*, 62 F.3d 1347, 1349-1351 (11th Cir. 1995) (rejecting Board's analysis); *Henry* v. *INS*, 8 F.3d 426, 434-439 (7th Cir. 1993) (same); *Goncalves* v. *INS*, 6 F.3d 830, 832-835 (1st Cir. 1993) (same); *Butros* v. *INS*, 990 F.2d 1142, 1144-1146 (9th Cir. 1993) (en banc) (same); *Vargas* v. *INS*, 938 F.2d 358, 360-364 (2d Cir. 1991) (same). Notwithstanding that conflict in the appellate decisions, the question does not merit review by the Court.

As we explained in our brief in opposition to certiorari in *Ghassan* v. *INS*, 507 U.S. 971 (1993) (No. 92-872), Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5066, directed the Attorney General to promulgate regulations that would delineate more precisely the circumstances under

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[2] There is no merit to petitioner's suggestion (Pet. 4-5) that *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), requires the conclusion that an alien's filing of a motion to reopen renders the Board's decision "non-final." This Court rejected that argument in *Stone* v. *INS*, 115 S. Ct. 1537, 1543-1545 (1995).

which motions to reopen would be permissible. On April 16, 1996, the Attorney General promulgated those regulations.[3] See Attorney General Order No. 2020-96, 61 Fed. Reg. 18,900 (1996). The new regulations require that a motion to reconsider be filed within 30 days and a motion to reopen within 90 days of the Board's entry of a final order of deportation, see 61 Fed. Reg. 18,904-18,905 (1996) (to be codified at 8 C.F.R. 3.2(b)(2) and (c)(2)), whereas previously there was no deadline. The new regulations also resolve the question presented by the certiorari petition by providing that lawful permanent residence status terminates upon entry of a final order of exclusion or deportation and that a motion to reopen for consideration of an application for relief under 8 U.S.C. 1182(c) may be granted only if the alien was statutorily eligible for such relief prior to the entry of the final order. See 61 Fed. Reg. 18,904, 18,905 (1996) (to be codified at 8 C.F.R. 1.1(p) and 3.2(c)(1)).

The courts of appeals that have rejected the Board's position have relied heavily on the notion that the analysis of the Board in *Cerna*—that aliens seeking relief under Section 1182(c) cannot file motions to reopen—is inconsistent with the provisions of 8 C.F.R. 3.2 authorizing motions to reopen. See, *e.g.*, *Acosta-Montero*, 62 F.3d at 1349-1351; *Henry*, 8 F.3d at 438-439; *Goncalves*, 6 F.3d at 832-833; *Butros*, 990 F.2d at 1144. Indeed, speaking for the First Circuit panel in *Goncalves*, then-Judge Breyer expressly

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[3] Because the statutorily mandated revision of the reopening regulations was believed to be imminent, we opposed review in *Ghassan*, *Katsis* and *Nwolise* and declined to file petitions seeking certiorari in *Goncalves*, *Henry*, *Butros*, and *Acosta-Montero*.

suggested that the problem be resolved by amending the regulations, in lieu of seeking review in this Court. *Goncalves*, 6 F.3d at 835-836; see also *Acosta-Montero*, 62 F.3d at 1351 ("If the INS now wishes to adopt different regulations, that route is available to it"). The new regulations promulgated by the Attorney General, by expressly addressing the subject of motions to reopen that seek discretionary relief under 8 U.S.C. 1182(c), have done precisely that, thus eliminating the basis of the appellate rulings that have rejected the Board's position. Accordingly, the circuit conflict on which petitioner relies lacks any continuing importance and does not call for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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